United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 19,450

RAY H. JONES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

294

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Stanley Wanger
1625 K Street, N. W.
Washington, D. C. 20006
Counsel for Appellant
(Appointed by this Court)

December 20, 1965

QUESTIONS PRESENTED

In the opinion of Appellant, the following questions are presented:

1. Was the evidence sufficient to support the verdict of guilty of robbery where the Government witnesses who identified Appellant as the robber testified that they were in very close proximity to the robber in a well lighted store, that they clearly observed his facial features, and that they saw no scars on the robber's face, and where the uncontroverted evidence demonstrated that Appellant had four prominent scars on his face and forehead at the time of the trial and in fact had these scars for several years prior to the date of the robbery?

2. Was reversible error committed when Government counsel in his closing argument to the jury commented that the testimony of the Government witnesses who identified Appellant as the robber was corroborated by prior consistent statements made by these witnesses which were made available to defense counsel during the trial but, with one exception, were never used by defense counsel during the trial?

3. Did the Court err in denying Appellant's requests for the production of certain statements under the Jencks Act, 18 U.S.C. § 3500, where the evidence shows that the Court failed to hold a hearing outside the presence of the jury to consider Appellant's requests, that the Court failed to interrogate the Government agents who recorded the statements in question, that the Court's rulings were based upon its own knowledge

and experience and representations made by Government counsel, and that the Court imposed upon Appellant the burden of establishing that the statements were "substantially verbatim recitals" of what the Government witnesses had said to the Government agents?

INDEX

TABLE OF AUTHORITIES

CASES:

* Cases or authorities chiefly relied upon are marked by asterisks.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RAY H. JONES,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 19,450
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a judgment of conviction by the United States District Court for the District of Columbia for robbery under Title 22, District of Columbia Code, Section 2901. Appellant is proceeding in forma pauperis pursuant to an order of the District Court dated June 4, 1965. The jurisdiction of this Court is invoked under Rule 41 of the General Rules of this Court and Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

At approximately 8:45 p.m. on January 30, 1965, two men entered the Fairway Food Store located at 2501 North Capitol Street, Washington,

D. C. (Tr. 6, 40-41, 115-118). One of the men (hereinafter referred to as Man No. 1) proceeded to the meat counter in the rear of the store and inquired about a roast (Tr. 6, 41, 117, 141). The other man (hereinafter referred to as Man No. 2) remained in the front of the store and purchased a soda (Tr. 6-7, 41-42, 118). The two men left the store together (Tr. 7-8, 42). Moments later, Man No. 2 returned to the store alone, drank another soda, and departed the store (Tr. 8, 42).

Shortly after Man No. 2 left the store, both Man No. 1 and Man No. 2 re-entered the store together (Tr. 8, 42, 87-88, 116). As the two men approached a counter in the front of the store where the cash register was located, Man No. 2 walked to the right of the counter and down an aisle to the rear of the store (Tr. 8, 42). Man No. 1, however, remained at the counter and pointed a gun at the cashier, Marvin Smith, who was standing behind the counter (Tr. 8, 42, 88, 117).

Man No. 1 demanded that Smith give him the money from the cash register (Tr. 8, 43, 118). When Smith hesitated, Man No. 1 ordered Smith to open the cash register (Tr. 8). Smith opened the cash register and Man No. 1 reached across the counter and removed approximately sixty dollars from the cash register (Tr. 8-10, 43, 118).

Man No. 1 then directed Smith to come out from behind the counter (Tr. 9, 43). When Smith began walking slowly, Man No. 1 grabbed Smith by the back of his coat and pushed him into a back room

where Fred Arbogas, a co-owner of the store, was working (Tr. 9, 43, 118-119, 142). Man No. 1 pointed his gun at Arbogas and demanded Arbogas' money (Tr. 9, 143). Arbogas gave Man No. 1 approximately ten dollars which he had in his pocket (Tr. 143). Man No. 1 ordered Arbogas to surrender his wallet (Tr. 143). Arbogas handed over his wallet which contained no money (Tr. 143). Man No. 1 then fled the store (Tr. 9, 143).

On March 8, 1965, Appellant was indicted on two counts of robbery of the Fairway Food Store on January 30, 1965. One count of the indictment relates to the money taken from cashier Smith; the other count of the indictment concerns the money taken from Arbogas. Appellant was arraigned on March 12, 1965 and pleaded not guilty to both counts of the indictment.

Appellant was tried by a jury in the United States District Court for the District of Columbia (Criminal Case No. 248-65). The trial commenced on April 27, 1965 and concluded on April 30, 1965.

The Government called eight witnesses. Five of the Government witnesses were present in the store at the time the offense was committed. These witnesses are as follows: (1) Marvin Smith, cashier in the store; (2) Neal Hunt, an employee of the store; (3) Alvin Parrish, an employee of the store; (4) Georgia Evans, a customer in the store; and (5) Fred Arbogas, a co-owner of the store. On direct examination each of these

witnesses identified Appellant as the person who robbed the Fairway Food Store.

On cross-examination each of the foregoing Government witnesses gave a detailed description of the person who committed the offense. Their descriptions, which in almost every respect are identical, include such information as the age, height, facial features, and articles of clothing worn by the robber (Tr. 30-34, 62-63, 102-104, 124, 136-137, 157-159). Three of the witnesses -- Smith, Hunt, and Parrish -- were specifically asked on cross-examination if they observed any scars on the robber's face. Each witness testified that he did not see any scars (Tr. 34, 68, 137). Witnesses Evans and Arbogas were asked by defense counsel if they observed anything unusual about the facial features of the robber. Evans testified that she did not notice anything unusual or peculiar about his face (Tr. 103-104, 112). Arbogas testified that the only unusual facial feature that he observed was a mustache (Tr. 159).

Upon the conclusion of the Government's case, defense counsel moved for a judgment of acquittal (Tr. 194). This Motion was denied (Tr. 195). The defense then presented its case, calling as witnesses the following persons: (1) Appellant; (2) Elaine Greene, Appellant's common law wife; and (3) Joseph Harbaugh, an attorney.

Appellant testified in his own behalf and denied having robbed the Fairway Food Store (Tr. 213). Appellant's appearance in the court-

room during the trial revealed to the Court and to the jury that he has four prominent scars on his face and forehead (Tr. 212). Appellant testified that he has had two of the scars since 1963, one scar since 1946, and the other scar since he was eight or nine years of age (Tr. 212). Elaine Greene also testified that Appellant has had all four scars on his face and forehead since 1963 (Tr. 203).

The jury found Appellant guilty on both counts of the indictment. However, before reaching its verdict, the jury deliberated from 10:53 a.m. to 4:10 p.m. on April 29, 1965 and from 10:00 a.m. to 11:45 a.m. on April 30, 1965 (Vol. 3, Tr. 235-237).

On June 4, 1965, Appellant received a sentence of one (1) to five (5) years for this conviction.

STATUTES INVOLVED

Title 18, United States Code, Section 3500, which is involved in this appeal, provides in relevant part that:

> "(b) After a witness called by the United States has testified on direct examination, the Court shall, on Motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the Government which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the defendant for his examination and use.

* * *

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means —

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

STATEMENT OF POINTS

1. The evidence was insufficient to support the verdict of guilty.

2. Government counsel in his closing argument to the jury committed reversible error by relying upon prior consistent statements, which were inadmissible evidence, to bolster the testimony of his own unimpeached witnesses.

3. The Court, failing to discharge its affirmative duty to conduct an appropriate inquiry as required under the Jencks Act, erroneously denied Appellant's requests for the production of statements pursuant to the Jencks Act.

SUMMARY OF THE ARGUMENT

I. The evidence was insufficient to support the verdict of guilty.

The Government called five witnesses who identified Appellant as the person who committed the robbery. Each witness unequivocally testified that he was in very close proximity to the robber, that the store was well lighted, that he clearly observed the robber's face, and that he saw no scars whatsoever on the robber's face.

Appellant's appearance at the trial revealed to the Court and to the jury that Appellant has four prominent scars on his face and forehead. The uncontroverted evidence also established that Appellant had all these scars for several years prior to the date of the robbery.

The testimony of the Government witnesses identifying Appellant as the robber was patently inconsistent with and contradictory to their own positive testimony that there were no scars on the face of the robber. This critical internal contradiction in the testimony of the Government witnesses thoroughly discredits their identification of Appellant as the robber and renders that identification unworthy of belief.

It is clear that upon the evidence a reasonable mind could not find guilt beyond a reasonable doubt. Appellant's conviction should be reversed and the case remanded to the District Court with directions to enter a judgment of acquittal.

II. Government counsel in his closing argument to the jury committed reversible error by relying upon prior consistent statements, which were inadmissible evidence, to bolster the testimony of his own unimpeached witnesses.

During the trial Government counsel furnished to defense counsel statements which were made by three Government witnesses prior to their testimony before the Grand Jury and statements which were given by all five Government witnesses to police officers shortly after the commission of the robbery. The jury was aware that these statements were in the possession of defense counsel during the trial and that, with one exception, defense counsel made no use of the statements.

In his closing argument to the jury, Government counsel commented that the prior statements made by the Government witnesses were consistent with their testimony in the case. Government counsel further argued to the jury that these prior consistent statements therefore corroborated the testimony of the Government witnesses identifying Appellant as the robber.

Since the prior consistent statements of the Government witnesses could not properly be admitted in evidence, Government counsel exceeded the bounds of legitimate argument by his reliance upon inadmissible evidence to strengthen the testimony of his own unimpeached witnesses. Under the authority of this Court's decision in Johnson v. United States,

_____U.S. App. D.C._____, 347 F.2d 803 (1965), Government Counsel's improper comments to the jury require reversal of Appellant's conviction.

III. The Court, failing to discharge its affirmative duty to conduct an appropriate inquiry as required by the Jencks Act, erroneously denied Appellant's requests for the production of statements pursuant to the Jencks Act.

The evidence with respect to three Government witnesses shows the following: (1) each witness made an oral statement to an agent of the Government which related to the subject matter as to which the witness testified, i.e., the identification of Appellant as the robber; (2) the Government agent involved recorded these oral statements on interview notes contemporaneously with the making of the statements; and (3) defense counsel, after each witness had testified on direct examination, made timely demands for production of the interview notes pursuant to the Jencks Act. Therefore, the trial judge had an affirmative duty to conduct an appropriate inquiry to determine whether the interview notes were in existence and in the possession of the Government and, if so, whether they were producible statements within the meaning of the statute.

The Court did not conduct the type of inquiry required under the Jencks Act. The Court failed to hold a hearing outside the presence of

the jury. The Court failed to interrogate the police officers who had taken the interview notes. The Court improperly relied on its own personal knowledge and experience and the representations of Government counsel. The Court erroneously imposed upon Appellant the burden of showing that the interview notes were "substantially verbatim recitals" within the purview of the statute.

The Court thus erred in its denial of Appellant's requests under the Jencks Act. The case should be remanded to the District Court in order that an appropriate inquiry under the Jencks Act can be conducted.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY

With respect to Point I, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 6, 10, 26, 30-35, 41, 60-63, 68, 102-104, 109, 112, 117, 124, 130, 135-137, 141, 143, 152, 157-159, 203, 212-213.

The law is well settled that a conviction will be reversed on appeal if the evidence at trial was not sufficient to support the verdict. In reviewing findings of guilt in criminal jury cases, this Court has consistently applied this test: The conviction must be reversed if it is clear

that upon the evidence a reasonable mind could not find guilt beyond a reasonable doubt. See Jackson v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____, decided November 4, 1965; Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954). Applying this standard to the case at bar, as shown below, it is submitted that Appellant's conviction should be reversed for insufficiency of the evidence and a judgment of acquittal should be entered.

The central issue at the trial was whether Appellant was in fact the person who robbed the Fairway Food Store on January 30, 1965. There was no dispute that a robbery was committed at the store. Nor was there any controversy respecting the facts and circumstances surrounding the commission of the offense.

The Government called as witnesses five persons who were present in the store when the robbery occurred. Each of the witnesses identified Appellant as the robber. Appellant, however, testified in his own behalf and emphatically denied having committed the robbery (Tr. 213).

Appellant's presence in the courtroom during the trial revealed to the Court and to the jury that Appellant has four prominent scars on his face and forehead (Tr. 212). It is uncontroverted on this record that Appellant has had all of these facial scars since 1963 (Tr. 203, 212).

While the evidence shows beyond any question that Appellant had four prominent scars on his face and forehead at the time of the robbery, each of the Government witnesses unequivocally testified that there were no scars on the robber's face (Tr. 34, 68, 103-104, 112, 137, 159). This testimony is fully supported by the following uncontradicted evidence in the case: First, each witness positively testified that the store was well lighted at the time of the robbery and that he clearly saw the robber's face (Tr. 31, 34-35, 62-63, 68, 112, 130, 136, 152, 158). Second, each witness was in very close proximity to the robber when the crime occurred. Witnesses Smith, Hunt, and Parrish were approximately four feet away; witness Arbogas was but a few feet away; and witness Evans was approximately ten feet away (Tr. 10, 26, 34, 60, 109, 135, 143). Third, the witnesses had two opportunities to observe the robber. One opportunity arose, of course, when the crime was committed. The other opportunity presented itself immediately before the robbery when the robber entered the store to inquire about some meat and then left the store (Tr. 6, 41, 117, 141). Fourth, each witness was able to provide a detailed description of the robber which included such information as his age, height, facial features, and clothing (Tr. 30-34, 62-63, 102-104, 124, 136-137, 157-159). If the witnesses had sufficient time and opportunity to make these observations, then they had sufficient time and opportunity to see whether the robber had any scars on his face.

In short, if there had been any visible scars whatsoever on the robber's face, they unquestionably would have been noticed by these witnesses. Therefore, the Government's own witnesses have established beyond a reasonable doubt that the robber's face bore no scars.

Based on the evidence in the case, Appellant submits that the testimony of the Government witnesses identifying Appellant as the robber is patently inconsistent with and contradictory to their own positive testimony that there were no scars on the robber's face. Faced with the irrefutable physical fact of Appellant's scars, their identification of Appellant is inherently incredible. Because of the critical internal contradiction in and inherent incredibility of their testimony, each witness has thoroughly discredited his own identification of Appellant as the robber and that identification is therefore rendered unworthy of belief. Indeed, the Court should never have permitted this case to go to the jury.

In the final analysis, this is a clear and simple case of mistaken identity. The person who robbed the Fairway Food Store is the person described by the Government's witnesses -- a person without visible facial scars. That person is not and cannot be Appellant.

In conclusion, the jury's verdict of guilty on both counts of robbery is wholly arbitrary. See Douglas v. United States, 99 U. S. App. D. C. 232, 239, 239 F.2d 52, 59 (1956). It is clear that upon

the evidence a reasonable mind could not find guilt beyond a reasonable doubt. See Jackson v. United States, supra. Therefore, the conviction should be reversed for insufficiency of the evidence and the case remanded to the District Court with directions to enter a judgment of acquittal. Cf. Cooper v. United States, supra.

II. GOVERNMENT COUNSEL IN HIS CLOSING ARGUMENT TO THE JURY COMMITTED REVERSIBLE ERROR BY RELYING UPON PRIOR CONSISTENT STATEMENTS, WHICH WERE INADMISSIBLE EVIDENCE, TO BOLSTER THE TESTIMONY OF HIS OWN UNIMPEACHED WITNESSES

With respect to Point II, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 8, 15-16, 47, 81, 147, 149, 190-192, 247-248, 252, Vol. 3, Tr. 235-237.

In his closing argument to the jury, Government counsel commented that the testimony of five Government witnesses identifying Appellant as the robber was corroborated by prior consistent statements made by these witnesses. Under the authority of this Court's recent decision in Johnson v. United States, _____ U.S. App. D.C. _____, 347 F.2d 803 (1965), Government counsel's attempt to bolster the testimony of his own unimpeached witnesses by reliance on inadmissible evidence is patently improper and constitutes reversible error.

The evidence shows that Government counsel, in the presence of the jury, handed to defense counsel statements which were made by

Government witnesses Smith, Hunt, and Arbogas prior to their testimony before the Grand Jury (Tr. 15-16, 47, 149). These were statements which were producible under the Jencks Act, 18 U.S.C. § 3500. Williams v. United States, 117 U. S. App. D. C. 206, 328 F.2d 178 (1963). Defense counsel examined these statements in the presence of the jury but at no time did he make any use of these statements.

The evidence further shows that Government counsel, in the absence of the jury, furnished to defense counsel Police Department Form 251 (Tr. 81). This report, according to Government counsel, was based on interview notes taken by police officers and contained statements which were made by all five Government witnesses when interviewed immediately after the robbery. Because of remarks made by both Government counsel and defense counsel during the trial, the jury was apprised that statements given to the police by witnesses Smith and Arbogas were in the possession of defense counsel (Tr. 147, 190). Additionally, defense counsel utilized Form 251 during his cross-examination of Smith (Tr. 191-192).

In his closing argument to the jury, Government counsel vigorously argued the credibility of the five Government witnesses. In an effort to strengthen their testimony, Government counsel made the following comments with respect to the aforementioned grand jury statements and Police Department Form 251:

"Then I would ask you to recall all this prior identification. You have heard all the business about turning over statements made to the grand jury, descriptions given to the police, and what the descriptions were like. You saw them turned over to defense counsel.

"I submit to you -- you have heard defense counsel by the way, point out that those descriptions would have been made while the witness' recollections were fresh.

"I submit to you ladies and gentlemen, that the only detail which defense counsel would find in all of those descriptions was that Mr. Smith had said, perhaps he said that the defendant was 6 foot 4 instead of 6 foot 2. There was not a single discrepancy that defense counsel could point to. In all of those statements that he demanded.

"In short, as defense counsel pointed out, if there was any doubt about the identifications here, it was fully corroborated by all those descriptions that were given to the police, examined in front of you by defense counsel, and then followed by a mass of silence except for a two inch difference in height, 6 foot 2 or 6 foot 4. That was the only thing he could come up with.

* * *

". . . The identification is fully corroborated by descriptions given immediately after the event. . ." (Tr. 247-248, 252; emphasis supplied). 1/

1/ This portion of the closing argument contains a flagrant misstatement by Government counsel, i. e., his comment that "defense counsel" pointed out that the prior statements corroborated the identification of Appellant by the Government witnesses. There is no record support whatever that defense counsel made any such statement. Appellant submits that this misstatement by Government counsel merely compounds the prejudicial effect of his reliance upon prior consistent statements to buttress the testimony of his witnesses.

As a result of what occurred in the presence of the jury during the trial and what was stated by Government counsel in his closing argument, the jury was fully aware that three Government witnesses had made statements prior to their testimony before the Grand Jury and that all five witnesses had made statements to the police shortly after the robbery. The jury was also cognizant that these statements were in the possession of defense counsel during the trial and, with only one exception, defense counsel made no use of the statements.

Capitalizing on the jury's awareness of the prior statements, as indicated above, Government counsel's closing argument to the jury had a twofold thrust: First, defense counsel's failure, with one exception, to utilize these prior statements which were in his possession proves that the statements were consistent with the testimony of the witnesses. Second, since the prior statements were consistent, the statements thereby corroborate the testimony of the witnesses that Appellant was the robber. It is manifest from the foregoing that Government counsel has exceeded the bounds of proper closing argument.

The statements relied on by Government counsel were not admitted in evidence. Moreover, as prior consistent statements, they could not have been properly admitted in evidence. Therefore, Government counsel clearly erred in his reliance upon inadmissible evidence to bolster and strengthen the testimony of his own unimpeached witnesses. 4 Wigmore, Evidence § 1124 (3d ed. 1940).

The prejudicial effect of this error is apparent. As Appellant demonstrated in Point No. I, supra, challenging the sufficiency of the evidence, there was considerable doubt whether in fact Appellant committed the robbery. Despite the testimony of five Government witnesses identifying Appellant as the robber, the jury deliberated for approximately seven hours before reaching their verdict (Vol. 3, Tr. 235-237). Since this was a close case where the credibility of the Government's witnesses was crucial to the Government's case, there was a reasonable possibility that Government counsel's improper comments during his closing argument had an influential if not persuasive effect upon the jurors. Therefore, Appellant was exposed to a reasonable possibility of prejudice in fact by Government counsel's comments to the jury.

In support of the position that Government counsel's improper closing argument to the jury constituted reversible error, Appellant relies upon this Court's decision in the Johnson case, supra. In Johnson, as in the case at bar, Government counsel in his closing argument to the jury commented that the testimony of a Government witness was corroborated by a prior consistent statement which Government counsel had handed to defense counsel in the presence of the jury but which defense counsel had not used during the trial. This Court,

holding that Government counsel's argument to the jury was erroneous, reversed the conviction.

The rationale of Johnson appears in the following language from the decision:

> ". . . It is elementary however, that counsel may not premise arguments on evidence which has not been admitted. Here the evidence on which the prosecutor predicated his argument to the jury, even if formally tendered to the court, could not have been admitted over objection.
>
> "It is a well known rule of evidence, applicable in criminal and civil cases alike, that prior consistent statements may not be used to support one's own unimpeached witness. The Jencks Act gives the defendant the unqualified right to inspect prior statements of Government witnesses made to Government agents and relating to the subject matter of their testimony, but it does not abrogate this time-honored common law evidence rule. No one would seriously argue that the Government could formally introduce Jencks Act statements in support of its own unimpeached witness. Yet the comments of the prosecuting attorney in this case accomplish virtually the same result in the minds of the jurors. Based as they are on inadmissible evidence, such comments are not permissible." (347 F.2d at 805-806).

Appellant submits that the Johnson case is directly in point and therefore controlling in the case at bar. Accordingly, Appellant's conviction should be reversed.

III. THE COURT, FAILING TO DISCHARGE ITS AFFIRMATIVE DUTY TO CONDUCT AN APPROPRIATE INQUIRY AS REQUIRED BY THE JENCKS ACT, ERRONEOUSLY DENIED APPELLANT'S REQUESTS FOR THE PRODUCTION OF STATEMENTS PURSUANT TO THE JENCKS ACT

With respect to Point III, Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 7-9, 13-16, 44-45, 47, 77-82, 115-116, 146-148, 176-178, 182.

The Jencks Act, 18 U.S.C. § 3500, requires that "/a/fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." (emphasis supplied). Paragraph (e) of the statute defines a "statement" to include the following:

> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The law has imposed upon the Court the responsibility of insuring that the Jencks Act is properly and effectively enforced. Campbell v. United States, 365 U. S. 85, 81 S. Ct. 421 (1961). When a defendant seeks the production of a statement as defined in the statute, the trial

judge has an affirmative duty to determine whether such statement exists and is in the possession of the Government and, if so, to order the production of the statement. Campbell v. United States, supra; Saunders v. United States, 114 U. S. App. D. C. 345, 316 F.2d 346 (1963); Hilliard v. United States, 115 U. S. App. D. C. 86, 317 F.2d 150 (1963); Williams v. United States, 117 U. S. App. D. C. 206, 328 F.2d 178 (1963).

Because the defendant often does not and cannot know whether any such statement exists, the trial judge must conduct a hearing, outside the presence of the jury, to determine whether the conditions of the statute have been satisfied. Williams v. United States, supra; Saunders v. United States, supra; See also Johnson v. United States, supra. It is incumbent upon the trial judge at such a hearing to evaluate all relevant evidence, which may involve an interrogation of the Government witnesses or the Government agents or an in camera examination of what is purported to be a statement within the purview of the statute. Williams v. United States, supra; Saunders v. United States, supra. The trial judge may not discharge his responsibility under the Jencks Act by relying on his own personal knowledge or experience or on representations made by Government counsel. Killian v. United States, 368 U. S. 231, 240-244, 82 S. Ct. 302 (1961); Williams v. United States, supra, footnote 1, page 180; United States v. Accardo, 298 F.2d 133, 138, 141 (7th Cir., 1962); United States v. Keig, 320 F.2d 634, 637 (7th Cir., 1963).

Applying the foregoing principles to the instant case, as shown below, it must be concluded that the Court did not discharge its responsibility to enforce the Jencks Act. The evidence shows that the trial judge failed to conduct an appropriate inquiry, outside the presence of the jury, to determine whether interview notes taken by police officers with respect to certain oral statements made by three Government witnesses were producible under the Jencks Act. Consequently, there was no valid basis or justification whatever for the trial judge's denial of Appellant's timely requests under the statute for production of the interview notes.

A separate discussion for each of the three Government witnesses involved will follow, demonstrating conclusively that on this record the trial judge's rulings under the Jencks Act were wholly erroneous.

1. Witness Arbogas

On direct examination Government witness Arbogas identified Appellant as the person who committed the robbery (Tr. 141-142). On cross-examination Arbogas testified that he gave a description of the robber to a police officer who interviewed him shortly after the robbery. Arbogas further testified that the police officer"made notes" of his oral statement (Tr. 146-147). At that point defense counsel specifically invoked Paragraph (e)(2) of the Jencks Act and requested production of the police officer's interview notes (Tr. 147-148).

In the presence of the jury, the trial judge discussed the Jencks Act request with counsel for the parties (Tr. 147-148). The police officer who had taken the notes was never called as a witness to testify. Nor did the trial judge personally examine the interview notes. After a brief discussion with counsel, the Court denied Appellant's request for the interview notes. The reason given by the Court for its ruling is as follows:

> "THE COURT: You haven't shown anything by this witness or any other witness that it was a substantial verbatim statement of what this man told him, and so you haven't made any showing that entitles you to any statement. Nor /sic/ indeed, there is no showing that there was any such statement, written statement." (Tr. 148).

The Court's ruling is manifestly without merit. There was no burden on Appellant under Paragraph (e)(2) of the statute to establish that the interview notes constituted a "substantially verbatim statement" of what Arbogas had said to the police officer. Squarely in point and dispositive of the question is Williams v. United States, supra, where this Court held:

> "The burden is not upon the defendant to prove that the statements requested are substantially verbatim recitals within the meaning of the Act. As we have indicated, the duty of examining all available evidence rests upon the trial judge himself, assisted by the parties." (328 F.2d at 180-181).

Accord: Ogden v. United States, 303 F.2d 724, 737 (9th Cir, 1962)

2. Witness Hunt

On direct examination Government witness Hunt identified Appellant as the person who committed the robbery (Tr. 44). On cross-examination Hunt testified that he gave a description of the robber to a police officer who interviewed him almost immediately after the robbery (Tr. 182). Hunt further testified that the police officer had taken notes during the interview (Tr. 45). Defense counsel, pursuant to the Jencks Act, expressly demanded production of the police officer's interview notes (Tr. 45, 47).

Extensive discussion, some of which occurred in the presence of the jury, was held with respect to this Jencks Act request. This discussion involved the trial judge, counsel for the parties, and witness Hunt; the police officer who had taken the notes was never called as a witness to testify on the subject. In opposing defense counsel's request, Government counsel indicated, inter alia, that the Government did not have the interview notes in its possession. Government counsel, however, did acknowledge that he had been unable to contact and speak with the police officer involved (Tr. 77-78, 176-178).

The trial judge denied Appellant's request for production of the interview notes. The basis for the Court's ruling is reflected in the following colloquy between the trial judge and defense counsel:

"THE COURT: I am going to tell you. The Jencks Rule allows you to have statements that are in the possession of the Government. The Government hasn't in its possession, according to Mr. Weinreb /Government counsel/, any such statement.

"MR. BYRNE /Defense Counsel/: Your Honor, as I understand it, they have not been able to contact the officer, as I understand an Officer Andrews, who may have had this statement.

* * *

"MR. BYRNE: Yes. Your Honor, again as I understand Mr. Hunt's testimony as to the existence of such notes --

"THE COURT: It doesn't make any difference if he did so. The Government says it doesn't have in its possession this thing. So therefore if they don't have it they can't produce it." (Tr. 176-178).

The Court's ruling is clearly erroneous. The Court may not rely on the representations of Government counsel in discharging its function of insuring that the conditions of the statute have been satisfied. Killian v. United States, supra; United States v. Accardo, supra; United States v. Keig, supra. Hence, Government counsel's representations were not and could not be a valid substitute for a hearing, outside the presence of the jury, which included the testimony of the police officer who had taken the interview notes.

3. Witness Smith

On direct examination Government witness Smith identified Appellant as the person who committed the robbery (Tr. 7 - 9). On

cross-examination Smith testified that he gave a description of the robber to a police officer who interviewed him shortly after the robbery (Tr. 13). Smith further testified that the police officer had taken notes during the interview (Tr. 13-14). Defense counsel, relying upon the Jencks Act, requested the production of the police officer's interview notes (Tr. 14-16).

With respect to this request, a discussion, both in and out of the presence of the jury, was held among the trial judge and counsel for the parties (Tr. 14-16, 77-82). Government counsel at that time indicated that the interview notes were not in the possession of the Government (Tr. 77, 79-80). Government counsel's representation to the Court was based on his own out-of-court conversation with Officer Cosgrove, the police officer who interviewed Smith (Tr. 77). According to Government counsel, he was advised by Officer Cosgrove that the interview notes had been destroyed (Tr. 77). However, Officer Cosgrove was not called as a witness to be interrogated on the subject.

The trial judge denied Appellant's request under the Jencks Act on the ground that the interview notes, having been destroyed, were not in the possession of the Government. Pertinent to this ruling are the following statements made by the trial judge:

> "THE COURT:. . . Now, as for these other statements, Mr. Byrne, you know, after all it is only statements that are in possession of the Government that you are entitled to.

* * *

> "THE COURT: I believe that the standard practice here is to make that transfer from any little notes that they have made, and then to throw them away, it is like any other little piece of paper you may have in your possession." (Tr. 79-80).

The Court's responsibility under the Jencks Act was not discharged simply because Government counsel's information was based on his personal conversation with the police officer involved. Indeed, the Court had an affirmative duty to call that police officer and interrogate him on whether the interview notes in fact had been destroyed and, if so, the reasons and circumstances surrounding their destruction. Hence,the Court erroneously relied on Government counsel's representations that the notes were not in the possession of the Government. Killian v. United States, supra; Accardo v. United States, supra; Keig v. United States, supra.

The Court also erred by relying upon its own knowledge and experience to conclude that the interview notes had been destroyed. Directly apposite is the following pronouncement of this Court in the Williams case, supra:

> "In ruling that the statements were not substantially verbatim within the meaning of the Jencks Act the learned judge seems to have relied in part upon his own personal knowledge of how the government conducted grand jury proceedings. We think this should not have played a part in his decision, which should be made on the record before him." (328 F.2d 178, footnote 1 at 180).

In conclusion, the evidence with respect to Government witnesses Arbogas, Hunt, and Smith shows: (1) each witness made an oral statement to an agent of the Government which related to the subject matter as to which the witness testified, i.e., the identification of Appellant as the robber; (2) the Government agent involved recorded these oral statements on interview notes contemporaneously with the making of the statements; and (3) defense counsel, after each witness had testified on direct examination, made timely demands for production of the interview notes pursuant to the Jencks Act. Therefore, the trial judge had an affirmative duty to conduct an appropriate inquiry to determine whether the interview notes were in existence and in the possession of the Government and, if so, whether they were producible statements within the meaning of the statute.

The evidence decisively establishes that the Court did not conduct the type of inquiry required under the Jencks Act. The Court failed to hold a hearing out of the presence of the jury. The Court failed to interrogate the police officers who had taken the interview notes. The Court improperly relied on its own personal knowledge and experience and the representations of Government counsel. The Court erroneously imposed upon Appellant the burden of showing that the interview notes were substantially verbatim recitals within the purview of the statute.

Accordingly, this Court should remand the case to the District

REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 19,450

RAY H. JONES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Stanley Wanger
1625 K Street, N. W.
Washington, D. C. 20006
Counsel for Appellant
(Appointed by this Court)

February 2, 1966

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RAY H. JONES,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 19,450
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	

REPLY BRIEF FOR APPELLANT

In its Brief, Appellee concedes that the Court below erred in denying Appellant's requests under the Jencks Act (18 U.S.C. § 3500) for certain interview notes taken by police officers of oral statements made by Government witnesses Arbogas and Hunt (Appellee's Brief, pp. 11, 13). Therefore, insofar as the interview notes appertaining to witnesses Arbogas and Hunt are concerned, Appellee concurs with Appellant that this case should be remanded to the District Court in order that an inquiry consonant with the requirements of the Jencks Act can be held (See Appellant's Brief, Point III, pp. 20-29).

Appellee's concession of error, however, does not dispose of this case. As Appellee's Brief discloses, there are three contested issues

which remain: (1) the sufficiency of the evidence; (2) the comments of Government counsel in his closing argument to the jury; and (3) the District Court's denial of Appellant's request under the Jencks Act for the production of police interview notes relating to oral statements made by Government witness Smith. Moreover, with respect to the first and second issues mentioned above, Appellant urges that his conviction for robbery be reversed.

On the basis of Appellee's Brief, Appellant herein reaffirms and reasserts his position regarding each of the aforementioned contested issues. As shown below, Appellee's arguments and contentions in opposition are wholly without merit and should be rejected by this Court.

I.

Appellee baldly asserts that the verdict of guilty of robbery is "sustained by substantial evidence to support it." 1/ However, Appellee does not deny or dispute the fact that each of the Government witnesses who identified Appellant as the robber testified that there were no scars on the robber's face. Appellee does not deny or dispute that Appellant has scars on his face and forehead and,indeed, had such scars at the time

---

1/ In that portion of Appellee's Brief entitled "Summary of Argument and Argument", there is no discussion or argument whatsoever by Appellee justifying its position on this issue (pp. 11-12). Hence, the basis for Appellee's position must be gleaned from Appellee's "Counter-statement of the Case" (Appellee's Brief, pp. 1-5).

of the robbery.[2/] Nor does Appellee deny or dispute that if Appellant's scars are visible, then, as a matter of law, the testimony of the Government witnesses identifying Appellant as the robber is inherently incredible and there is not and cannot be sufficient evidence to support the verdict.

Instead, Appellee apparently attempts to justify the verdict on the ground that the record does not reveal the nature and extent of Appellant's scars (Appellee's Brief, p. 4). It is most significant, however, that nowhere does Appellee ever contend that Appellant's scars are not visible. In effect then, Appellee is asking this Court to blindly accept and sustain the verdict and to refrain from reviewing the sufficiency of the evidence. Appellee's position is patently untenable.

It is submitted that Appellant does in fact have visible facial scars which, under the particular circumstances and conditions existing at the time of the robbery, would clearly have been noticed by the Government witnesses who identified Appellant as the robber. In further support of his position, Appellant is filing simultaneously with the Court a Motion To Compel Production Of Appellant At Oral Argument. Appellant's

---

2/ Appellant testified that he has four scars on his face and forehead (Tr. 212). Appellant further testified that two of the scars are under his right eye (Tr. 212). In actuality, the two scars under his right eye are very close to one another and, blending together, they appear as one large scar.

appearance at the oral argument will demonstrate conclusively that Appellant does have visible facial scars and, therefore, has been the victim of mistaken identification. Appellant respectfully urges that his Motion be granted.

In conclusion, upon the evidence in this case a reasonable mind could not find guilt beyond a reasonable doubt. Appellant's conviction should be reversed and the case remanded to the District Court with directions to enter a judgment of acquittal.

II.

In Point II of his Brief (pp. 14-19), Appellant demonstrated that Government counsel in his closing argument to the jury commented that the testimony of five Government witnesses identifying Appellant as the robber was corroborated by prior consistent statements made by these witnesses. Under the authority of this Court's recent decision in Johnson v. United States, ___ U.S. App. D.C. ____, 347 F.2d 803 (1965), Government counsel's attempt to bolster the testimony of his own unimpeached witnesses by reference to and reliance upon inadmissible evidence was patently prejudicial and constitutes reversible error.

Appellee recognizes and, in effect, acknowledges that the aforementioned comments of Government counsel to the jury during closing argument are violative of this Court's decision in the Johnson case.

Nonetheless, Appellee argues that the prejudicial effect of these comments was "dissipated" by certain comments made by defense counsel in his closing argument to the jury. Appellee's argument, it is submitted, is ill-conceived and totally devoid of substance.

In the circumstances of this case, nothing defense counsel did say or might have said to the jury during closing argument could have in any way erased the highly prejudicial comments which were forcefully and vigorously made by Government counsel and which were firmly implanted in the minds of the jurors. The serious prejudicial impact of such comments upon the jury is readily discernible.

As the record discloses, the identification of Appellant as the robber was the key issue in the case. Although five Government witnesses identified Appellant as the robber, this definitely was not an "open and shut" case. To the contrary, there was considerable doubt at the trial whether in fact Appellant did commit the crime. That the jury deliberated for approximately seven hours before reaching its verdict fully attests to the fact that this was a very close case.

Viewed in this context, it is most significant that Government counsel commented to the jury that the prior consistent statements of the Government witnesses corroborated their identification of Appellant as the robber (Tr. 247-248). Thus, Government counsel heavily relied

upon inadmissible evidence to strengthen the testimony of his own unimpeached witnesses with respect to the critical issue of identification and not a minor, subsidiary issue in the case. Hence, the prior consistent statements of the Government witnesses might well have impressed the jurors and persuaded them that the testimony of the Government witnesses was more trustworthy and more reliable and entitled to greater weight. Indeed, in a close case such as this, there is a reasonable possibility that the prior consistent statements were the influential consideration or factor which ultimately convinced the jury that the Government witnesses correctly identified Appellant as the robber even though the witnesses observed no scars on the robber's face.

Accordingly, in the circumstances of this case as in the Johnson case, supra, a very real and distinct possibility of prejudice to Appellant was created by Government counsel's manifestly improper comments to the jury. The damage resulting from these comments was not and could not be undone by certain subsequent comments to the jury by defense counsel.

Moreover, the highly prejudicial remarks here involved were initiated by Government counsel, not defense counsel; they were not a reaction to or in retaliation of some impropriety of defense counsel. In short, there was simply no excuse for these comments. Defense

counsel, being unexpectedly confronted with these prejudicial comments, could not afford to let them go unanswered. Since defense counsel's purely defensive remarks to the jury were compelled by Government counsel's prejudicial comments, it would be incongruous and wholly unreasonable to penalize Appellant for defense counsel's unsuccessful effort to counteract the irreparable harm wrought by Government counsel.

Finally, Appellee, in support of its position, relies upon this Court's per curiam affirmance in Anderson v. United States, No. 19,174, decided October 28, 1965. It is submitted, however, that the Anderson case is clearly distinguishable from the case at bar and is thus without any relevance whatever to this case. In the instant case, as well as in the Johnson case, supra, Government counsel argued to the jury that the testimony of the Government witnesses was corroborated by a prior consistent statement made by the witnesses. In contrast, Government counsel in Anderson argued to the jury that the Government witness, who took contemporaneous notes of two illegal sales of narcotics by Appellant in that case, had recorded his recollections with care. For an excellent discussion distinguishing the Anderson case from the Johnson case, see Brief for Appellee (pp. 8-10) in the Anderson case. Hence, it must be concluded that Appellee's reliance upon Anderson is entirely misplaced.

In conclusion, this Court's decision in the Johnson case requires

that Appellant's conviction be reversed and that the case be remanded for a new trial.

III.

As indicated supra, Appellee concedes that the Court below erred in denying Appellant's requests under the Jencks Act for the production of certain police interview notes relating to oral statements of Government witnesses Arbogas and Hunt. Appellee, however, asserts that no error was committed by the District Court's denial of Appellant's request under the Jencks Act for the production of certain police interview notes relating to oral statements of Government witness Smith. Therefore, according to Appellee, this case should be remanded to the District Court for a further hearing under the Jencks Act only insofar as witnesses Arbogas and Hunt are concerned. Appellee opposes a further hearing under the Jencks Act with respect to witness Smith.

There is no valid justification or basis for Appellee's position regarding Government witness Smith. The evidence shows that Smith made an oral statement to an agent of the Government which related to the subject matter as to which Smith testified, i. e., the identification of Appellant as the robber (Tr. 13). The evidence also shows that the Government agent involved, a police officer, recorded Smith's oral statement on interview notes contemporaneously with the making of the

statement (Tr. 13-14). The evidence further shows that defense counsel made a timely demand for production of the interview notes pursuant to the Jencks Act (Tr. 14-16).

Squarely faced with a legitimate Jencks Act request, the trial judge had an affirmative duty at that point in the trial to conduct a hearing, outside the presence of the jury, to determine whether the interview notes were in existence and in the possession of the Government and, if so, to order the production of the notes. Saunders v. United States, 114 U. S. App. D. C. 345, 316 F.2d 346 (1963); Williams v. United States, 117 U. S. App. D. C. 206, 328 F.2d 178 (1963). Instead of holding an immediate hearing under the Jencks Act, the trial judge ruled as follows:

> "THE COURT: I am not going to call for any notes now. When the man who made the notes takes the stand, if he does, you may then have the notes " (Tr. 15).

The trial judge thus erred in failing to conduct an immediate hearing under the Jencks Act at the time Appellant demanded production of the police interview notes.

Furthermore, the Court never held an appropriate inquiry to determine whether the conditions of the statute had been satisfied. Instead, at a later stage of the trial, the Court committed further error by concluding that Appellant was not entitled to the interview notes relating to witness Smith because they had been destroyed (Tr. 77-80). This conclusion

was predicated upon two totally invalid grounds: (1) the representations of Government counsel based on his personal out-of-court conversation with the police officer who had taken the notes, and (2) the Court's own knowledge and experience. Killian v. United States, 368 U. S. 231, 240-244, 82 S. Ct. 302 (1961); Williams v. United States, supra, footnote 1, page 180. Significantly, the police officer who had taken the interview notes was never called as a witness to testify about the notes.

Based on the foregoing errors of the Court, it is clear that the Court did not fulfill its responsibility and obligation to enforce the Jencks Act. Campbell v. United States, 365 U. S. 85, 81 S. Ct. 421 (1961). The Court failed to discharge its affirmative duty to conduct an inquiry, outside the presence of the jury, to determine whether the interview notes relating to witness Smith had in fact been destroyed and, if so, the circumstances of their destruction. And, indispensable to such an inquiry, would be the testimony of the police officer who had taken the notes but who was never called to testify in this case. In the circumstances of this case -- particularly the fact that the interview notes in question had a direct bearing upon the crucial issue of identification -- any assumption defense counsel may have made respecting the destruction of the notes did not relieve the Court of its responsibility under the Jencks Act of examining all "relevant and available evidence". Campbell v. United States, supra; Williams v. United States, supra.

Nor does Alexander v. United States, 118 U. S. App. D. C. 406, 336 F.2d 910, cert. den. 379 U. S. 935 (1964) preclude a further hearing under the Jencks Act with regard to witness Smith. In Alexander, as distinguished from the case at bar, the police officer who made a hand-written report of the offense there involved was a witness in the case and testified that the report had been destroyed. In the instant case, however, the police officer who had taken the interview notes was never called as a witness to testify. As indicated above, the Court erroneously relied on its own knowledge and experience and on the representations of Government counsel in determining that the notes had been destroyed. Therefore, in the instant case, as distinguished from Alexander, the trial judge's determination that the police interview notes had been destroyed was not based upon relevant and available evidence. Accordingly, the Alexander case has no applicability to the case at bar.

IV.

For the reasons set forth above and in Appellant's Brief, the contentions of Appellee should be rejected and the relief requested by Appellant should be granted.

Respectfully submitted,

Stanley Wanger

Stanley Wanger
Counsel for Appellant
(Appointed by this Court)

February 2, 1966

Service of a copy of the foregoing Reply Brief is hereby acknowledged this 2nd day of February, 1966

David G. Bress
United States Attorney
for the District of Columbia

By_____

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,450

RAY H. JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
Assistant United States Attorneys.

Cr. No. 248-65

QUESTIONS PRESENTED

1. Was there sufficient evidence to support the verdict when five eyewitnesses to the crime identified appellant as the robber?

2. Was the prosecutor's closing argument plain error affecting substantial rights when defense counsel in his argument to the jury turned the prosecutor's rhetoric around to his own advantage?

INDEX

TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,450

RAY H. JONES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

A. Sufficiency of the Evidence

Marvin Smith, Jr., a twenty year old Howard University student, testified that on January 30, 1965, he was working—apparently part-time—as a cashier at the Fairway Food Store, 2501 North Capitol Street, Washington, D. C. At approximately 8:45 p.m. that evening appellant and another man entered the store. While the "other man" purchased a soda, appellant walked to the back of the store "just looking around." (Tr. 6-7.) They then left and in about two or three minutes the unidentified individual returned for a second soda and again walked

out. In another minute or two following his exist both of them re-entered the store, this time in a single file with appellant in the rear. "[A]s they passed in front of the counter, the second man walked over to the right, down the right aisle and Mr. Jones (appellant) turned left and he had a gun in his hand." (Tr. 8.) Appellant then told the witness to open the cash register.

> "And at that time I walked up to the register and opened it and while holding the gun on me with his right hand, he reached across the counter with his left and took the money from the register." (Tr. 8-9.)

After scooping up the money appellant pushed Mr. Smith into the back room where they encountered Mr. Fred Arbogas, a co-owner of the food store.

> "[A]t this time he had the gun in my back, and he stuck the gun around me and pointed it at Mr. Arbogast (*sic*) and told him to empty his pockets and give him his money and after Mr. Arbogast (*sic*) gave him what money he had, he ran out of the store." (Tr. 9.)

Cross-examination brought out the fact that appellant had worn "a regular man's hat" with a narrow brim while committing the robbery (Tr. 21, 30). Mr. Smith also recalled that the robber was "dark skinned and had a mustache." (Tr. 38.)

The following eyewitnesses to the robbery also identified appellant as the robber:

1) Neal Hunt, a seventeen year old McKinley High School student, who was working in the store that evening (Tr. 39-41).

2) Georgia Evans, a fifteen year old Langley Junior High School student, who was in the store as a customer (Tr. 85-88).

3) Alvin Parrish, a ninteen year old freshman at D.C. Teachers College, who was also working in the store that evening (Tr. 114-116).

4) Fred Arbogas, co-owner of the food market (Tr. 139-143).

In addition, one Cora Preston testified that as of February 2, 1965, appellant was wearing a mustache (Tr. 168-169).[1]

Appellant testified that on the day in question he had taken his common law wife to a birthday party at 53 Bates Street, Northwest at about 3:00 or 4:00 p.m. After joining "the festivities" for a while he left alone at 6:30 or 7:00 p.m. He then related his various wanderings about the North Capitol Street area. Upon returning to the Bates Street address at approximately 10:00 p.m. and learning that his wife had already left the house, he took a bus home (Tr. 208-210, 214, 235-236). He also stated that he had previously worn a mustache but had shaved it off in December of 1964. He gave his height as 6 feet 2 inches (Tr. 210-211).[2]

On cross-examination appellant admitted that one of the places he visited upon leaving the party at 6:00 or 7:00 p.m., the Redwood Inn, was about four blocks from the scene of the robbery, and, that 53 Bates Street was about three blocks from the Redwood Inn (Tr. 214-215).

In an apparent effort to put some heat into the traditionally cold appellate record, appellant advises this Court that:

> "Appellant's appearance in the courtroom during the trial revealed to the Court and to the jury that he has *four prominent scars* on his face and forehead (Tr. 212)." (Br. 4-5) (Emphasis supplied.)

A characterization oft repeated. See Question Presented No. 1; Br. 7, 11, 12.

The first mention at trial of so-called prominent scars on appellant's face is contained in defense counsel's opening statement.

---

[1] He had none at trial.

[2] One Joseph Harbaugh, a lawyer, testified that when he had seen appellant on February 2, 1965, the latter had no mustache (Tr. 207-208).

"We will present evidence, . . ., to show you visually that the defendant has on his face prominent scars which should have been clearly noticed by any robbery victims, . . ., that he had these scars, one of which, the most predominant on his forehand, since 1963.

He has two very visible scars under each eye which he has had approximately since 1946." (Tr. 196-197.)

On direct examination of appellant's common law wife, Elaine Greene, counsel asked:

"Q How long has Ray had this scar on his face?
A Since 1963.
Q Does he have a scar under his eye?
A Yes he does.
Q Do you know how long he has had that?
A One of them he has had since 1963, and the other one he has had before I knew him." (Tr. 203.)

During direct examination of appellant the following occurred:

"Q That scar you have on your forehead, when did you get it?
A This was in 1963.
Q And the scar under your right eye, when did you get that?
A I have two scars there. I have had one since I was about 8 or 9 years old, and the other one I got in 1963, also.
Q And how about the scar under your left eye?
A That has been there since 1946, somewhere . . . ." (Tr. 212.)

Appellant was then exhibited to the jury (Tr. 212).

Thus, the "four prominent scars" so boldly asserted on this appeal were only seen as three scars by defense counsel; the one on the forehead being his main exhibit. Indeed, who can say how visible the ones under his eyes were considering their depth, width, severity and discoloration (all present unknowns) as against appellant's dark complexion (a known fact). The prosecutor, who

observed appellant, obviously didn't think much of these lesser markings as indicated by his rebuttal argument:

> "I ask you whether they (witnesses) would have noticed that scar in the circumstances of this case, with the fact that the defendant was wearing a hat that night which would, undoubtedly have cast some shadow over his forehead." (Tr. 267.)

B. Jencks Act Statements

While appellant's synopsis of the record under this topic is accurate with regard to the witnesses Arbogas and Hunt, it falls short in its treatment of the facts concerning the witness Smith's Jencks statements (Br. 22-27).

After it was determined that Mr. Smith had related a description of the robber to a police officer shortly after the robbery and that the latter had taken notes of the conversation, defense counsel requested those notes under the Jencks Act (Tr. 13-14). The prosecutor could not produce them because they were not in his trial jacket (Tr. 14-15).

> "THE COURT: I am not going to call for any notes now. When the man who made the notes takes the stand, if he does, you may then have the notes.
>
> MR. BYRNE (Defense counsel): Yes, Your Honor.
>
> THE COURT: You may then recall this witness if you want to." (Tr. 15.)

The prosecutor did, however, furnish defense counsel with a copy of a statement given by Mr. Smith prior to his testifying before the grand jury (Tr. 16).

Sometime later in the trial the prosecutor informed the court that he had ascertained that an Officer Cosgrove had spoken to Mr. Smith at the robbery scene.

> "He (Cosgrove) said all that he took so far as he recalled was the description of the man who came in to the store, he put it on the run pad, and that as far as he knows, it is in the trash now. When the books are used up he throws them away." (Tr. 77.)

Defense counsel also indicated that he had spoken with Officer Cosgrove the prior evening about this matter (Tr. 79). He urged that if this statement was transposed by the officer "to the C and R book, or to the 251 Form," and the original had been destroyed in good faith, that he was then entitled to the police form(s) which contained the original information (Tr. 80). The prosecutor then agreed to turn this material over to counsel:

> "May the record reflect I am furnishing Mr. Byrne with a statement transferred from the notes of the officer and the C and R Book, containing the lookout description and information given by Mr. Smith.
> THE COURT: Yes." (Tr. 81.)

When Mr. Smith was later recalled to testify, defense counsel utilized this recently acquired Jencks material in conducting his cross-examination of this witness (Tr. 189-193).

Counsel was thus, apparently content with the completeness of the production of Mr. Smith's statements, for he no longer pressed any Jencks claim with regard to him.

C. Prosecutor's Closing Argument

On cross-examination of Mr. Smith, counsel brought out the fact the witness had given an oral description of the robber to a police officer on the evening of the crime which the officer had recorded (Tr. 13). Neither those notes nor their progeny were produced in court at that time. See B., *supra*. Government counsel did, however, turn over a prior statement of the witness' to defense counsel.

(Prosecutor)

> "Your Honor, in order to expedite matters, I do have a copy of the statement made by Mr. Smith prior to his testimony before the Grand Jury which I will furnish to Mr. Byrne at this time. (See *Williams* v. *United States*, 119 U.S. App. D.C. 177, 338 F.2d 286 (1964).
> THE COURT: Very well." (Tr. 15-16.)

Mr. Byrne then read the statement in the presence of the jury (Tr. 16). He also requested the witness to repeat his description of the robber given to the police officers on January 30, 1965 (Tr. 32).

> "As far as I can recall, the description I gave the policeman was his height, which I estimated at six or six-one, his age which I estimated between 25 and 27, and I also told them that he had a mustache." (Tr. 33.)

Counsel was developing the fact that the witness had not noticed any scars on the robber's face (Tr. 34).

During cross-examination of Neal Hunt, defense counsel also established before the jury the fact that the witness had spoken to a note taking police officer soon after the crime (Tr. 45). Although those notes were unavailable counsel did remark:

> "MR. BYRNE: Your Honor, again I think because of the extreme problem of identity in this particular case that I am going to request those police notes." (Tr. 45.)

The prosecutor did furnish counsel in open court with Hunt's pre-grand jury statement (Tr. 47-48).

The trial court elicited the following while probing Mr. Hunt's recollection of what he had told the officer at the crime scene:

> "THE WITNESS: I can recall one thing he said, he asked me: How tall do you think the witness (*sic*) was? And I said: About six-four. And then he took his hat off and said: How tall do you think I am? I said: You are about six feet. He said: You are pretty good . . . ." (Tr. 53-54.)

A similar pattern was developed during cross-examination of Mr. Fred Arbogas:

1. He gave a police officer an oral description of the robber which the officer had written down (Tr. 146).

2. Counsel was provided with the witness' pre-grand jury statement (Tr. 149.)
3. Counsel elicited Mr. Arbogas' oral description of the robber given on the evening of the crime (Tr. 159).

Neal Hunt was recalled as a witness and reiterated the description of the robber he had given to a police officer (Tr. 182-183).

Marvin Smith was also recalled as a witness and cross-examined by defense counsel who was now possessed of Officer Cogrove's transcribed notes, see B., *supra*, which had been turned over to him in the absence of the jury (Tr. 75, 77-82, 85).

(By defense counsel)

"Q Mr. Smith, do you recall yesterday when I asked you how tall this man was that pointed a gun at you; do you remember me asking you that question?

A I remember you asking it, sir.

Q Do you remember what answer you gave?

A I think I said six-one, approximately six-one, or six-two.

Q Did you ever give a different height for this particular person at any time?" (Tr. 189.)

The court then interposed the objection that this went beyond the scope of the direct examination.

"MR. BYRNE: Your Honor, I think I asked that this witness—could I be allowed to recall this witness at a later time, once I had been furnished with the Police Report as to his description of this particular person? That matter was I think left open yesterday." (Tr. 190.)

The court agreed and counsel then asked Mr. Smith if he had not given the police a height of six foot four inches for the robber. The witness responded that this was possible (Tr. 191).

With these antecedent facts, before the jury, the prosecutor remarked in closing argument:

"I would ask you to recall a singular fact that I observed, that when each of these people were asked about the descriptions they gave to the police, asked what this man who came in to the store looked like, not one of them, if I recall, looked over at the defendant to see what he looked like. Each testified from his memory, testified to the tall, thin man with the moustache, not a single one of them looked over to see what that man looked like in order to check their memories. They were all able to testify without looking at the defendant.

Then I would ask you to recall all this prior identification. You have heard all the business about turning over statements made to the grand jury, descriptions given to the police, and what the descriptions were like. You saw them turned over to defense counsel.

I submit to you—you have heard the defense counsel by the way, point out that those descriptions would have been made while the witness' recollections were fresh.

I submit to you ladies and gentlemen, that the only detail which defense counsel would find in all of those descriptions was that Mr. Smith had said, perhaps he said that the defendant was 6 foot 4 instead of 6 foot 2. There was not a single discrepancy that defense counsel could point to. In all of those statements that he demanded.

In short, as defense counsel pointed out, if there was any doubt about the identifications here, it was fully corroborated by all those descriptions that were given to the police, examined in front of you by defense counsel, and then followed by a mass of silence except for a two inch difference in height, 6 foot 2 or 6 foot 4. That was the only thing he could come up with." (Tr. 247-248.)

* * * *

"In conclusion, however cautiously you examine identification—of course it must be considered with caution—there is no occasion to doubt it in this case. You have five eye witnesses in a clearly light, well lit store. This is not the case of a mugging on the street.

2. Counsel was provided with the witness' pre-grand jury statement (Tr. 149.)
3. Counsel elicited Mr. Arbogas' oral description of the robber given on the evening of the crime (Tr. 159).

Neal Hunt was recalled as a witness and reiterated the description of the robber he had given to a police officer (Tr. 182-183).

Marvin Smith was also recalled as a witness and cross-examined by defense counsel who was now possessed of Officer Cogrove's transcribed notes, see B., *supra*, which had been turned over to him in the absence of the jury (Tr. 75, 77-82, 85).

(By defense counsel)

"Q Mr. Smith, do you recall yesterday when I asked you how tall this man was that pointed a gun at you; do you remember me asking you that question?

A I remember you asking it, sir.

Q Do you remember what answer you gave?

A I think I said six-one, approximately six-one, or six-two.

Q Did you ever give a different height for this particular person at any time?" (Tr. 189.)

The court then interposed the objection that this went beyond the scope of the direct examination.

"MR. BYRNE: Your Honor, I think I asked that this witness—could I be allowed to recall this witness at a later time, once I had been furnished with the Police Report as to his description of this particular person? That matter was I think left open yesterday." (Tr. 190.)

The court agreed and counsel then asked Mr. Smith if he had not given the police a height of six foot four inches for the robber. The witness responded that this was possible (Tr. 191).

With these antecedent facts, before the jury, the prosecutor remarked in closing argument:

"I would ask you to recall a singular fact that I observed, that when each of these people were asked about the descriptions they gave to the police, asked what this man who came in to the store looked like, not one of them, if I recall, looked over at the defendant to see what he looked like. Each testified from his memory, testified to the tall, thin man with the moustache, not a single one of them looked over to see what that man looked like in order to check their memories. They were all able to testify without looking at the defendant.

Then I would ask you to recall all this prior identification. You have heard all the business about turning over statements made to the grand jury, descriptions given to the police, and what the descriptions were like. You saw them turned over to defense counsel.

I submit to you—you have heard the defense counsel by the way, point out that those descriptions would have been made while the witness' recollections were fresh.

I submit to you ladies and gentlemen, that the only detail which defense counsel would find in all of those descriptions was that Mr. Smith had said, perhaps he said that the defendant was 6 foot 4 instead of 6 foot 2. There was not a single discrepancy that defense counsel could point to. In all of those statements that he demanded.

In short, as defense counsel pointed out, if there was any doubt about the identifications here, it was fully corroborated by all those descriptions that were given to the police, examined in front of you by defense counsel, and then followed by a mass of silence except for a two inch difference in height, 6 foot 2 or 6 foot 4. That was the only thing he could come up with." (Tr. 247-248.)

* * * *

"In conclusion, however cautiously you examine identification—of course it must be considered with caution—there is no occasion to doubt it in this case. You have five eye witnesses in a clearly light, well lit store. This is not the case of a mugging on the street.

Not where a man concealed himself. A man in plain view came in with a gun and was seen by the people in that store and positively identified him. The identification is fully corroborated by descriptions given immediately after the event—fully corroborated by surrounding circumstances like that moustache, now gone." (Tr. 252.)

Defense counsel responded:

"The United States Attorney tells us that 'I got all of these statements,' yet I was not able to find any inconsistencies or anything. Ladies and gentlemen, I found one big omission, the man that I am defending has an enormous scar on his forehead, and in none of those police reports, in none of the testimony I have heard has there been any indication the man who held up this store, who was so clearly and positively identified, had a scar on his forehead or underneath both of his eyes." (Tr. 262.)

STATUTE AND RULE INVOLVED

Title 18, United States Code, Section 3500, provides in pertinent part:

* * * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Rule 52, Federal Rules of Criminal Procedure, provides:

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT AND ARGUMENT

Introduction

Insofar as it is possible that the oral statements of the witnesses Arbogas and Hunt given to police officers on the evening of the crime were embodied in written statements which were producible by the Government at trial under the Jencks Act, we agree with appellant that the case should be remanded to the District Court to explore that possibility should this Court reject appellant's other two claims of error. *Moore* v. *United States*, 117 U.S. App. D.C. 254, 328 F.2d 555 (1964).

With regard to the witness Smith the record is clear, however, that defense counsel was satisfied with the production of Officer Cosgrove's transposed notes of Smith's oral statement and therefore, no further hearing is required for Jencks Act purposes. *Alexander* v. *United States*, 118 U.S. App. D.C. 406, 336 F.2d 910, *cert. denied*, 379 U.S. 935 (1964).

I

The jury verdict is sustained by substantial evidence to support it, taking the view most favorable to the Government. See *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).[3]

II

From the logomachy of closing arguments appellant has wrested a bit of the prosecutor's offensive upon which he bases a new claim that it stung him unfairly. If it be true that the prosecutor's argument strayed somewhat from permissible tolerances, defense counsel turned the rhetoric to his advantage when he advised the jurors that the "one big omission" in all those statements was the lack of any indication that apellant was scarred, *i.e.*, the statements in fact supported his thesis of a "wrong man" identification. Indeed, during trial it was defense counsel himself who sought to bring out the witnesses prior oral identifications of the robber to police officers on the evening of the offense; for those identifications also omitted reference to any facial scars. We submit, that when any taint was thus dissipated by counsel, so was the force of *Johnson* v. *United States*, —— U.S. App. D.C. ——, 347 F.2d 803 (1965), as a controlling precedent herein. See *Cross* v. *United States*, No. 19270, November 2, 1965.

In these circumstances, the per curiam affirmance in *Anderson* v. *United States*, No. 19,174, October 28, 1965, wherein another pre-*Johnson* closing argument by the prosecutor was attacked on appeal as plain error, is dispositive of this contention:

> "[A]ppellant's claim of error in the prosecuting attorney's closing argument will not be noticed, for there was no compliance with *Fed. R. Crim. P.*

---

[3] Appellant's protestations to the contrary (Br. 11-14), are more properly the subject matter of a closing argument; we fail to see their relevance at the appellate level.

51, and it has not been made to appear that there was plain error affecting substantial rights, Rule 52."

CONCLUSION

Wherefore, it is respectfully submitted that the Court should remand the case for a hearing to determine the existence of any Jencks Act statements of the witnesses Arbogas and Hunt and find the remaining aspects of the trial free of reversible error.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 799253 501

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RAY H. JONES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 19,450

PETITION FOR REHEARING EN BANC

Pursuant to Rule 26 of the General Rules of this Court, Appellant petitions for rehearing en banc of the Per Curiam Order issued on February 23, 1966 in the above-entitled cause. Rehearing en banc is herein requested on the ground that the Per Curiam Order is in direct and irreconcilable conflict with the recent decision of this Court in Johnson v. United States, _____ U.S. App. D.C. _____, 347 F.2d 803 (1965). In support of this Petition, Appellant shows the following:

1. Appellant was tried and convicted of robbery. The central issue at the trial was whether in fact Appellant was the person who committed the robbery. With respect to this crucial issue of identification, Government counsel in his closing argument to the jury commented that

the testimony of the Government witnesses identifying Appellant as the robber was corroborated by prior consistent statements made by these witnesses. Relying upon the authority of the Johnson case, supra, Appellant in his Brief (Point II, pp. 14-19) urged that Government counsel's attempt to bolster the testimony of his own unimpeached witnesses by reference to and reliance upon inadmissible evidence was patently prejudicial and constituted reversible error.

2. The pertinent facts surrounding Government counsel's improper argument to the jury are as follows. During the trial Government counsel furnished to defense counsel statements which were made by three Government witnesses prior to their testimony before the Grand Jury and statements which were given by all five Government witnesses to police officers shortly after the commission of the robbery. All of these statements were producible under the Jencks Act, 18 U.S.C. § 3500. See Williams v. United States, 117 U. S. App. D.C. 206, 328 F.2d 178 (1963). The jury was aware that these statements were in the possession of defense counsel during the trial and that, with one exception, defense counsel made no use of the statements.

In his closing argument to the jury, Government counsel vigorously argued the credibility of the Government witnesses. In an effort to strengthen their testimony, Government counsel made the following

comments with respect to the aforementioned grand jury statements and the statements given to the police officers:

> "Then I would ask you to recall all this prior identification. You have heard all the business about turning over statements made to the grand jury, descriptions given to the police, and what the descriptions were like. You saw them turned over to defense counsel.
>
> "I submit to you -- you have heard defense counsel by the way, point out that those descriptions would have been made while the witness' recollections were fresh.
>
> "I submit to you ladies and gentlemen, that the only detail which defense counsel would find in all of those descriptions was that Mr. Smith had said, perhaps he said that the defendant was 6 foot 4 instead of 6 foot 2. There was not a single discrepancy that defense counsel could point to. In all of those statements that he demanded.
>
> "In short, as defense counsel pointed out, <u>if there was any doubt about the identifications here, it was fully corroborated by all those descriptions that were given to the police,</u> examined in front of you by defense counsel, and then followed by a mass of silence except for a two inch difference in height, 6 foot 2 or 6 foot 4. That was the only thing he could come up with.
>
> * * *
>
> ". . . <u>The identification is fully corroborated by descriptions given immediately after the event.</u> . ." (Tr. 247-248, 252; emphasis supplied). 1/

1/ This portion of the closing argument contains a flagrant misstatement by Government counsel, i.e., his comment that "defense counsel" pointed out that the prior statements corroborated the identification of Appellant by the Government witnesses. There is no record support whatever that defense counsel made any such statement. Appellant submits that this misstatement by Government counsel merely compounds the prejudicial effect of his reliance upon prior consistent statements to buttress the testimony of his witnesses.

The statements relied on by Government counsel were not admitted in evidence. Moreover, as prior consistent statements, they could not have been properly admitted in evidence. Therefore, Government counsel clearly erred in his reliance upon inadmissible evidence to bolster and support the testimony of his own unimpeached witnesses. 4 Wigmore, Evidence § 1124 (3d Ed. 1940).

3. Squarely in point and indistinguishable from the case at bar is this Court's decision in the Johnson case, supra. In that case Appellant had been convicted of unauthorized use of a motor vehicle. At the trial the Government called as its witness a police officer who identified Appellant as the person he saw driving the automobile. Upon the conclusion of the police officer's testimony, defense counsel, exercising his rights under the Jencks Act, requested the production of two statements made by the officer prior to trial. These statements were handed over to defense counsel in the presence of the jury, but at no time did defense counsel make any use of the statements. With respect to the officer's identification of Appellant, Government counsel in his closing argument to the jury commented as follows:

> "Further corroboration, ladies and gentlemen, may be found in the fact that I produced for the benefit of this defense counsel statements in writing made to other persons by the police officer; and was there one satisfactory effort made to impeach the officer to suggest what he had made in his official report is in

> any way different from his testimony at trial? There is no difference, ladies and gentlemen, in these reports made at the time of the crime. They corroborate the testimony of the police officer from the stand."
> (347 F.2d at 805) (Emphasis supplied by the Court).

Defense counsel voiced no objection to the foregoing remarks made by Government counsel.[2/]

This Court, holding that Government counsel's argument to the jury was improper and prejudicial, reversed the conviction. The rationale of Johnson appears in the following language from the decision:

> ". . . It is elementary however, that counsel may not premise arguments on evidence which has not been admitted. Here the evidence on which the prosecutor predicated his argument to the jury, even if formally tendered to the court, could not have been admitted over objection.
>
> "It is a well known rule of evidence, applicable in criminal and civil cases alike, that prior consistent statements may not be used to support one's own unimpeached witness. The Jencks Act gives the defendant the unqualified right to inspect prior statements of Government witnesses made to Government agents and relating to the subject matter of their testimony, but it does not abrogate this time-honored common law evidence rule. No one would seriously argue that the Government could formally introduce

---

2/ The Court's opinion is actually silent on whether defense counsel interposed an objection. However, the record in Johnson reveals that there was no objection. Hence, the Court in Johnson implicitly held that there was plain error committed by Government counsel which affected Appellant's substantial rights under Rule 52 of the Federal Rules of Criminal Procedure.

> Jencks Act statements in support of its own unimpeached witness. Yet the comments of the prosecuting attorney in this case accomplish virtually the same result in the minds of the jurors. Based as they are on inadmissible evidence, such comments are not permissible." (347 F.2d at 805-806).

4. Additionally, in the circumstances of the instant case, as in Johnson, the serious prejudicial impact upon the jury of Government counsel's manifestly improper comments is readily apparent. As the record discloses, the identification of Appellant as the robber was the crucial issue in this case. Although five Government witnesses identified Appellant as the robber, this definitely was not an "open and shut" case. To the contrary, there was considerable doubt at the trial whether in fact Appellant did commit the crime.[3/] That the jury deliberated for approximately seven hours before reaching its verdict fully attests to the fact that this was a very close case.

3/ Each of the Government witnesses who identified Appellant as the robber testified unequivocally that he was in very close proximity to the robber, that the store was well lighted, that he clearly observed the robber's face, and that he saw no scars whatsoever on the robber's face. Appellant's appearance at the trial, however, revealed that he has prominent scars on his face and forehead. The uncontroverted evidence also established that Appellant had all these facial scars for several years prior to the robbery.

In his Brief (Point I, pp. 10-14), Appellant challenged the sufficiency of the evidence on the ground that the testimony of the Government witnesses identifying Appellant as the robber was patently inconsistent with and contradictory to their own positive testimony that there were no scars on the robber's face. It was Appellant's position that the identification made by the Government witnesses was inherently incredible and, therefore, unworthy of belief. In the Per Curiam Order issued in this case, the Court found "there was no reversible error" with respect to this issue.

Viewed in this context, it is most significant that Government counsel commented to the jury that the prior consistent statements of the Government witnesses corroborated their identification of Appellant as the robber. Thus, Government counsel heavily relied upon inadmissible evidence to strengthen the testimony of his own unimpeached witnesses with respect to the critical issue of identification and not a minor, subsidiary issue in the case. Hence, the prior consistent statements of the Government witnesses might well have impressed the jurors and persuaded them that the testimony of the Government witnesses was more trustworthy and more reliable and entitled to greater weight. Indeed, in a close case such as this, there is a reasonable possibility that the prior consistent statements were the influential consideration or factor which ultimately convinced the jury that the Government witnesses correctly identified Appellant as the robber. Therefore, Appellant was clearly exposed to a very real and distinct possibility of prejudice in fact by Government counsel's comments to the jury.

5. In the Per Curiam Order issued in this case, the Court, without any discussion or analysis whatever, disposed of the issue at hand by the following single statement:

> "With respect to appellant's contention. . .that reversible error was committed by counsel for the Government in his closing argument to the jury, we find that there was no reversible error."

Thus, despite the clear relevance and applicability of the Johnson case to the case at bar, the Court has not provided any reason or explanation why Johnson is not controlling in the instant case. Therefore, the Per Curiam Order, even though it avoids any mention of Johnson, in effect constitutes a wholly unwarranted departure from and rejection of sound precedent established by this Court.

WHEREFORE, for the reasons stated above, the Johnson case, which is factually indistinguishable from the case at bar, should govern the disposition of this case. Accordingly, under the authority of Johnson, Government counsel's highly prejudicial comments to the jury require reversal of Appellant's conviction. The Per Curiam Order of the Court, which found no reversible error, is patently inconsistent with Johnson. Because the Per Curiam Order has flatly and without any justification rejected and refused to adhere to another decision of this Court, this case should be reheard en banc.

Respectfully submitted,

By Stanley Wanger
Stanley Wanger
Counsel for Appellant
(Appointed by this Court)

Dated: March 9, 1966

Service of a copy of the foregoing Petition for Rehearing En Banc is hereby acknowledged this 9th day of March, 1966.

David G. Bress
United States Attorney
for the District of Columbia

By _____

The undersigned counsel for Appellant, by appointment of this Court, hereby certifies that the Petition for Rehearing En Banc is presented in good faith and not for delay.

Stanley Wanger

Stanley Wanger

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

RAY H. JONES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 19,450

PETITION FOR RECONSIDERATION

Appellant, on the basis of this Court's recent decision in Reichert v. United States (No. 19526), _____ F.2d _____, decided April 5, 1966, files this his Petition for Reconsideration of the Court's Per Curiam Order of April 14, 1966, which denied Appellant's Petition for Rehearing En Banc. In support of this Petition, Appellant shows the following:

1. In the case at bar where identification was the critical issue, Government counsel in his closing argument to the jury attempted to bolster his own unimpeached witnesses as to their identification of Appellant as the robber by reference to and reliance upon Jencks Act statements which were never admitted in evidence. On the basis of this

Court's decision in Johnson v. United States, ____ U.S. App. D. C. _____, 347 F.2d 803, Appellant urged in his Brief and again on oral argument that Government counsel's patently improper comments to the jury were highly prejudicial and constituted reversible error. The Johnson case was decided on June 15, 1965 by a panel consisting of Chief Judge Bazelon and Circuit Judges Washington and Wright.

2. On February 23, 1966, this Court (Senior Circuit Judge Bastian and Circuit Judges Burger and McGowan) issued a Per Curiam Order in the instant case wherein it found, inter alia, that there was "no reversible error" committed by Government counsel in his closing argument to the jury. The Per Curiam Order not only makes no mention whatsoever of the Johnson case, but, in fact, fails to even discuss this issue as raised by Appellant. Hence the basis for and reasoning underlying the Court's finding of "no reversible error" on a vital issue in the case was never divulged.

3. Appellant, on March 9, 1966, filed a Petition for Rehearing En Banc. In this Petition, Appellant demonstrated that the Johnson case was indistinguishable from the case at bar and should properly govern the disposition of this case. Therefore, under the authority of Johnson, Government counsel's highly prejudicial comments to the jury require reversal of Appellant's conviction.

In this Petition, Appellant further established that the Court in the instant case, which found no reversible error, has in effect rejected and refused to follow the Johnson case. Because of this patent inconsistency and conflict between the panel of this Court that decided Johnson and the panel of this Court that decided the case at bar, Appellant requested that the case be reheard en banc.

4. On April 5, 1966, a panel consisting of Circuit Judges Danaher, Fahy, and Wright decided the Reichert case, supra. In that case Reichert was tried and convicted of robbery. During the course of the trial, Government counsel, in the presence of the jury, handed to defense counsel certain Jencks Act statements. None of these statements were ever received in evidence. Since identification was a crucial issue in the case, Government counsel in his closing argument to the jury referred to and relied upon the Jencks Act statements to buttress the testimony of the Government witnesses identifying Reichert as the robber. As the Court observed, Government counsel intimated to the jury that the Jencks Act statements were consistent with and tended to corroborate the Government's own unimpeached witnesses. The Court, citing the Johnson case as authority, reversed Reichert's conviction on the ground that as to the critical issue of identification, Government counsel improperly premised his argument to the jury on evidence which had not been admitted.

Thus, the Reichert case is singularly apposite to the case at bar. In both cases identification was the critical issue. In both cases Government counsel in his closing argument to the jury attempted to strengthen the testimony of the Government witnesses as to identification by reliance on Jencks Act statements. And in both cases the Jencks Act statements so utilized by Government counsel were never admitted in evidence. Moreover, upon analysis, the instant case presents an even stronger and more compelling case for reversal than Reichert. In the case at bar, Government counsel expressly commented to the jury that the Jencks Act statements corroborated the testimony of the Government witnesses identifying Appellant as the robber. In Reichert, however, Government counsel merely "intimated" to the jury that the Jencks Act statements corroborated the testimony of the Government witnesses identifying Reichert as the robber.

In short, application of Reichert to the instant case would clearly dictate that Appellant's conviction should be reversed. Therefore, the Reichert case is wholly incompatible and inconsistent with the Per Curiam Order issued in this case.

WHEREFORE, Appellant's substantial rights were unquestionably prejudiced by Government counsel's manifestly improper comments to the jury. The serious prejudicial effect of such comments was fully recognized

and remedied by this Court in Reichert and Johnson, and those two decisions are plainly applicable to and, indeed, are necessarily controlling in the instant case. However, for reasons never stated, the panel that decided the case at bar found that Government counsel's comments to the jury did not constitute reversible error. Because of this glaring conflict between the panel in the instant case and the two different panels (comprising five Judges of the Court) that decided the Reichert and Johnson cases, Appellant requests that the Court reconsider its Per Curiam Order of April 14, 1966, and grant Appellant's Petition for Rehearing En Banc.

Respectfully submitted,

By Stanley Wanger
Stanley Wanger
Counsel for Appellant
(Appointed by this Court)

Dated: April 18, 1966

Service of a copy of the foregoing Petition for Reconsideration is hereby acknowledged this 18th day of April, 1966.

David G. Bress
United States Attorney
for the District of Columbia

By _____

The undersigned counsel for Appellant, by appointment of this Court, hereby certifies that the Petition for Reconsideration is presented in good faith and not for delay.

Stanley Wanger

Stanley Wanger